# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

*Petitioner,*

v.

OREGON STEVEDORING COMPANY, INC.,

*Respondent.*

## BRIEF FOR RESPONDENT

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# In the Supreme Court of the United States

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No. 876

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,

*Petitioner,*

v.

OREGON STEVEDORING COMPANY, INC.,

*Respondent.*

## BRIEF FOR RESPONDENT

### Question Presented

A fairer statement of the sole question presented to this Court is: Does a stevedore company breach its implied warranty of workmanlike service when it supplies equipment to a ship to be used in connection with the loading operation and that equipment fails, subjecting the shipowner to liability to an employee of the stevedore company, even though the stevedore company has not been negligent in any way?

The question of the effect of the express provision of the contract between petitioner and respondent

whereby respondent agreed to be responsible for injury of any person caused by its *negligence* (Resp. Exh. 21, R. 34) was not reached by the Court of Appeals (R. 54), is not presented in petitioner's brief, and will not be discussed by respondent, except as it may relate to the implied warranty question.

## SUMMARY OF ARGUMENT

The stevedore's warranty to a shipowner for whom it performs services is, in the absence of an express warranty, a warranty of workmanlike service. The stevedore is not an insurer of the work it performs or of the gear it furnishes to be used in connection with such work. The test to be applied to determine whether this warranty has been breached is one of reasonable care. When it has been determined that the stevedore has exercised reasonable care, the stevedore has not breached the warranty and the shipowner is not entitled to indemnity for its losses incurred in the defense of a personal injury claim by a longshoreman.

To compare the stevedore's warranty to the warranty of a bailor or supplier of equipment does not assist the shipowner in imposing an absolute warranty on the stevedore for the weight of authority at common law is that such a supplier has no duty beyond one of reasonable inspection. Most of the policy considerations which influence the courts in imposing an absolute warranty of fitness upon the manufacturer of a product do not apply in the shipowner-stevedore indemnity cases. In particular, the consideration of imposing liability on

the one most able to pay is inapplicable. That consideration was applicable in the matter between the longshoreman and the shipowner and no doubt influenced this court in its decision in *Reed* v. *The Yaka*, 373 U.S. 410. There is no policy reason why the onerous burden of the shipowner to provide a seaworthy ship should be passed on to a stevedore, who has been found by the trier of fact to be free of negligence.

## ARGUMENT

### Background of the Stevedore Warranty

It is agreed that the shipowner now owes to longshoremen doing work traditionally performed by seamen, a warranty of the seaworthiness of the ship and its appurtenances, which means that the ship and its appurtenances must be reasonably fit for their intended use. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85. This warranty extends to equipment brought aboard the ship by a stevedore contractor and used as a part of the ship's equipment in the furtherance of the contractor's work. *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396.

In 1955, this Court decided that stevedore contractors were subject to indemnity claims by shipowners based on an implied warranty of workmanlike service in spite of the exclusive liability provision of the Longshoremen's and Harbor Workers, Compensation Act.[1] *Ryan Stevedore Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U.S. 124.

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[1] 33 U.S.C. §905.

The *Ryan* case involved negligence in stevedore operations as admitted by petitioner (Pet. Brief, p. 9) but petitioner would draw from the language in the opinion an absolute warranty to insure the shipowner for any loss sustained by the shipowner as the result of the failure of the gear supplied by the stevedore, without regard to negligence.

This Court was faced with a dilemma at the time of the Ryan decision which should be kept in mind in analyzing the opinion. This dilemma is pointed out by the Court of Appeals in its decision in this case (R. 50, 51). This Court had held prior to *Ryan* that there could be no contribution based on comparative fault between shipowner and stevedore in the case of a longshoreman who sued a shipowner for personal injury. *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282. The basis of the Court's decision was that there was no contribution between joint tortfeasors at common law and the Court would not extend the equal division rule applied in collision cases to a non-collision case. The stevedore company was insulated from tort claims against it by its employees because of the provision of the Longshoremen and Harbor Workers' Compensation Act[2] and therefore a shipowner whose negligence may have been only 25% responsible for injury as compared with a stevedore whose negligence was 75% responsible had to bear the entire burden of the loss unless he had by express contract of indemnity made some arrangement to pass the loss or part of it off to someone else.

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[2] See Note 1 supra.

In order to relieve the shipowner of this burden, it was necessary to couch the shipowner's claim against the stevedore in terms of contract and not tort. The language of this Court in *Ryan* which immediately precedes the quoted language relied upon by petitioner (Pet. Brief, p. 9) puts the matter in proper context:

> "The shipowner's claim here also is not a claim for contribution from a joint tortfeasor. Consequently, the considerations which led to the decision in Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U. S. 282, 96 L. Ed 318, 72 S. Ct. 277, are not applicable. See American Mut. Liability Ins. Co. v. Matthews (C.A.2d N. Y.) 182 F.2d 322." 350 U.S. at p. 133.

The decision of the Court of Appeals in this case succinctly states the proper analysis of the language quoted by petitioner:

> "If the shipowner was to be relieved at all from the onerous burden of *Halcyon*, liability against the stevedoring company for its wrongs would necessarily have to be predicated upon contract and not tort. This background to *Ryan* cannot be separated from an analysis of the liability of the stevedoring company for breach of the implied warranty of workmanlike service. And when this background is kept in mind it seems reasonable to posit that the warranty of workmanlike service was intended only to impose liability in contract similar to that which would otherwise have been imposed in tort (for being negligent in the performance of stevedoring services)—not that the one (warranty) is the substitute for the other (tort) but that the standard of performance in each case is the same." (R. 51)

This analysis of the meaning of the language in the *Ryan* case is further buttressed by the language of this

Court in the same paragraph quoted by petitioner but not reported in petitioner's brief:

> "The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service." 350 U.S. at p. 134.

This Court took care to point out that we are going to look at a standard of performance and what is that standard? The standard is to load and unload cargo "with reasonable safety."[3] There is no absolute standard set up by this Court. In each case it is a question of fact whether the contractor performed its work in a careful and prudent manner and this involves a determination of whether the acts of the contractor have been such as would be done by a reasonable and prudent contractor similarly situated. In other words, a test based upon the concept of negligent *versus* non-negligent conduct. Here, the petitioner having contended that respondent was negligent (R. 18) and having failed to prove it (R. 26) submits that it is entitled to a different standard; one that puts it into the position of an assured.

The Court of Appeals, in its decision has discussed the lay and legal meaning of the term "workmanlike" (R. 48) which is the term used in the *Ryan* case at one point to describe the stevedore warranty.[4] It is clear that from either the standpoint of the layman or the judge, the word connotes a performance which is rea-

[3] 350 U.S. at p. 130.
[4] 350 U.S. at p. 133.

sonable under all of the circumstances. It is a performance which is free from negligence, or phrased another way, a performance as good as those similarly situated usually render.

Thus, we leave *Ryan* with the stevedore impliedly warranting to the shipowner that it will perform its services in a workmanlike manner and indemnify the shipowner for its failure to do so. Do the cases subsequent to *Ryan* impose a higher obligation on the stevedore? We respectfully submit they do not.

### Supreme Court Decisions Subsequent to Ryan

The Supreme Court cases subsequent to *Ryan* have consistently described the warranty of the stevedore as one of "workmanlike" service.

In *Weyerhaeuser SS Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, this Court stated in reference to the obligation of the stevedore company.

> "We believe that respondent's contractual obligation to perform its duties with *reasonable safety* related not only to the handling of cargo as in *Ryan*, but also to the use of equipment incidental thereto, such as the winch shelter involved here. * * * If in that regard respondent rendered a *substandard performance* which led to forseeable liability of petitioner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery." (Emphasis supplied) 355 U.S. at p. 567.

The Court does note that theories of "active" or "passive" and "primary" or "secondary" negligence are not to be used to determine the question of indemnity but there is no intimation that a finding of negligence or

substandard performance by the stevedore is no longer appropriate and necessary for recovery by the shipowner in the absence of an express contract of indemnity.

In *Crumady* v. *The J. H. Fisser*, 358 U.S. 423, this Court stated in holding that the stevedore was responsible for indemnity to the shipowner:

> "We conclude that since the negligence of the stevedore, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over." 358 U.S. at p. 429.

In *Waterman SS Corp.* v. *McNamara, Inc.*, 364 U.S. 421 this Court stated in reference to the warranty of a stevedore company:

> "The warranty may be breached when the stevedore's negligence does no more than call into play the vessel's unseaworthiness." 364 US at p. 423.

The petitioner's quotation concerning the *Waterman* case is no more than a reference to the Court's reasoning that it makes no difference insofar as the duty to indemnify is concerned whether the longshoreman brings an *in rem* or *in personam* proceeding.[5]

Petitioner seizes on the language of the most recent case of *Reed* v. *The Yaka*, 373 U.S. 410, which it regards as determinative of this case and even assumes that the Court of Appeals, if it had followed the *Reed* case would have reached a different result.[6]

A closer look at the case should somewhat temper petitioner's optimism. In the first place, there was an

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[5] Pet. Brief p. 10.

[6] Pet. Brief p. 12.

express hold harmless agreement between the stevedore-charterer and the shipowner for any claim arising out of the operation of the vessel. 183 F. Supp. 69, 70. Thus, the liability of the stevedore to the shipowner was, according to the trial judge, because of the terms of an express contract. 183 F. Supp. at 77.

The Court then was not faced with the question of deciding the scope of the stevedore's implied warranty for the stevedore was bound to an express hold harmless agrement. The problem facing the Court was the problem of the insulating effect of the Longshoremen's Act when the stevedore also was the operator of the ship. If the longshoreman could not recover against his employer, he would be without a remedy for his injury other than by way of compensation under the Longshoremen's Act. The Court merely held that when a stevedore becomes a shipowner, it cannot escape the shipowner's obligation to supply a seaworthy ship because of the provisions of the Longshoremen's Act.

The Court did not have occasion to pass upon the extent of the stevedore's implied warranty. By expression at least, the Court seemed to indicate it felt the warranty was one of non-negligent conduct.

> "And *Ryan's* holding that a negligent stevedoring company must indemnify a shipowner has in later cases been followed and to some degree extended." 373 U.S. at p. 415.

The cases cited in the footnote to this quotation are those that extend the warranty of workmanlike service to other than the immediate contracting party on the third party beneficiary theory. *Crumady* v. *J. H. Fisser*

*supra; Waterman SS Corp.* v. *Dugan & McNamara, Inc., supra.*

As we have noted, the cases in this Court subsequent to *Ryan* describe the breach of implied warranty of the stevedore in terms of negligence and give no indication of any higher obligation.

**Court of Appeals Decisions Subsequent to Ryan**

Only one case subsequent to *Ryan* has decided that the implied warranty of workmanlike service means more than non-negligent conduct. *Booth SS Co.* v. *Meier & Oelhaf Co.*, 262 F.2d 310 (C.A. 2). The Court of Appeals for the Ninth Circuit in this case rejects the holding of the Second Circuit in the *Booth* Case (R. 47). These are the only cases which directly consider the point.

The Court in the *Booth* case notes that the question of the liability of a contractor for indemnity, when said contractor has been without fault was not involved in the *Ryan* or *Weyerhaeuser* cases. 262 F.2d at p. 313. These cases were negligence cases.

The Court then comments upon cases cited by the shipowner for the proposition that a supplier of chattels is the absolute warrantor of their fitness for the use for which supplied:

> "Appellant has cited many cases in the federal, state and foreign courts which establish that a supplier of chattels, a bailor or lessor for example, impliedly warrants the suitability of the chattel for the use for which it is supplied. See, *e.g. Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*, 1926 A.

M. C. 342, 10 F.2d 769 (9 Cir.), *Boston Woven Hose & Co.* v. *Kendall*, 178 Mass. 232 (Mass. 1901) (HOLMES, C. J.); *Hoisting Engine Sales* v. *Hart*, 237 N. Y. 30 (1923); *Alaska S.S. Co.* v. *Pacific Coast Gypsum Co*, 71 Wash. 359, 128 Pac. 654 (1912); *Mowbray* v. *Merryweather* (1895) 2 Q.B. 640. In not one of these cases, however, was the injury producing defect one which would not have been disclosed on careful visual inspection. In the *Mowbray* case it was stipulated that the plaintiff's failure to detect the defect was negligent, and in others the fact that the defect was not hidden is equally clear. The point of concern in each case appears to have been whether the party suing for indemnity could recover despite his own possibly negligent failure to detect the flaw; and in all it was held that he could so recover. But in none was the court required to determine whether an injury produced by a hidden flaw would itself constitute a breach of the implied warranty. In *Hoisting Engine Sales* the New York court characterized the supplier's contract duty as at least one of "reasonable care and skill." and declined to decide whether the warranty might also be as absolute as warranties in the law of sales." 262 F.2d at p. 313.

It is interesting to note that the Court in the *Booth* case sorely limits the authority of the leading cases cited by the United States for the proposition that a supplier of chattel impliedly warrants the fitness of the product supplied without regard to negligence (Brief for the U.S. p. 8, 9). We shall have more to say about this alleged common law principle of absolute warranty later on.

The *Booth* case does go on to hold that a supplier of chattel impliedly warrants the fitness of the chattel relying on a number of commentators and some dicta in a previous decision by the Court. 262 F.2d at p. 314.

We will discuss later the merits of relying on the commentators in determining whether a common law warranty of fitness exists as applied to suppliers. The Court also places a great deal of emphasis on the ability of the supplier to make tests and inspect materials to detect defects and comes to the conclusion that it is reasonable that the supplier be charged with liability even though the supplier is not negligent. This argument is, we believe, capably answered by the Ninth Circuit (R. 47 f.n.6).

The point of the matter is that the shipowner has had every opportunity to prove what the Second Circuit says is relevant. The shipowner is not dealing with some manufacturer thousands of miles away; he is dealing with a stevedore to whose city of business he brings his ship. The shipowner can take deposition, prepare interrogatories, do all that is needed to establish his cause of action based on negligence. He is probably aided by the *res ipsa loquitur* doctrine and the stevedore must go forward and prove that it was not negligent in its operation. Generally the shipowner will win. The trier of fact, be it judge or jury, will determine that the stevedore was negligent. If no tests were made, the stevedore will be held negligent in failing to make any.

In this case, the trial judge determined that the evidence adduced by the stevedore was sufficient to overcome any inference of negligence. (Findings of Fact (22), R. 26). The petitioner failed to prove that respondent was negligent and wants another bite at the apple. Everything suggested by *Booth* in the way of

placing the burden on the stevedore because of its greater control over the chattel can be accomplished by applying a negligence test to the stevedore's conduct and giving the shipowner the benefit of any presumptions to which he may be entitled. To do otherwise is to make the stevedore an insurer of its operations.

This Court in *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355 was faced with the question of whether a stevedore is liable as a matter of law when a shipowner is negligent in failing to provide a safe place to work, and the stevedore proceeds to work knowing of the unsafe place to work. A longshoreman was injured while discharging bales of burlap. Around each bale of burlap were steel bands and the method of discharge was to hook onto a bale and raise it out of the hatch. During the course of discharge, two bands in one bale broke and the bale fell. The longshoreman sued the shipowner who impleaded the stevedore. The trial court submitted interrogatories to the jury which were answered and which found the shipowner negligent and the vessel unseaworthy and further found the stevedore performed its work in accordance with its contractual obligation. 269 U.S. at p. 357. The trial court entered judgment against the shipowner on the claim by the longshoreman and in favor of the stevedore on the indemnity claim. The Court of Appeals reversed the judgment in favor of the stevedore on the basis that if the shipowner was negligent in failing to provide a safe place to work, the stevedore was equally negligent as a matter of law in continuing to work. 369 U.S. at p. 358.

This Court reversed the Court of Appeals in its holding that the stevedore was liable as a matter of law. The Court held that it was up to the jury to determine as a question of fact whether the stevedore had discharged the cargo with the utmost care. This Court approved the following charges to the jury on the question of indemnity.

> "There again you have to run the whole gamut of facts in the case. You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge of this cargo, in the placing of the hook. Did they breach that contract to do it in a workmanlike manner with the utmost care? The steamship company says, 'Yes, they did. They breached that contract. They did not do it in a workmanlike manner. All the evidence here points to the fact that they did not do it with the utmost care, and therefore they caused the condition which created the liability which is ours, which the plaintiff has secured against us as defendants.' "

The trial judge further charged:

> "* * * Whether or not there was a breach of that contract, what you look to decide is whether or not there was reasonably safe discharge of that cargo by the Atlantic & Gulf Stevedores. If it was not, it was not done in a reasonably safe manner, then Atlantic & Gulf Stevedores would breach their warranty under the contract. If there was sub-standard performance on which it was foreseeable by them that some injury might happen or eventuate, then Atlantic & Gulf Stevedores would be responsible to the plaintiff shipping company." 369 U.S. p. 362.

The decision makes it clear that the determination of whether a stevedore has performed in a sub-standard

manner is to be left to the trier of fact who is to apply a test of reasonable care under the circumstances. The stevedore is not an insurer.

A later case from the same circuit that decided the *Booth* case but with slightly different panel lays down what respondent takes as the proper standard to be applied to the stevedore-shipowner implied warranty field:

> "* * * The contract between Clark and Cunard stated that the former would 'provide all necessary stevedoring labor, including winchmen, * * * foremen and such other stevedoring supervision as may be required for the proper and efficient discharging of cargo from or the loading cargo into vessel's holds. * * *' Under this agreement Clark was not required to act as an insurer against any loss by Cunard or to discover and correct every hidden danger. Its duty was only to perform its services with 'reasonable safety.' *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 1958, A. M. C. 501; *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 1956 A M. C. 9. 100 L. Ed. 133" *Calderola* v *Cunard S.S. Co., Ltd.*, 279 F.2d 475, 478, cert. den. 364 U.S. 884.

The same test was applied by the Third Circuit in *Hodgson* v. *Lloyd Brasileiro Patriomanio Nacional*, 294 F.2d 32, 34.

The Court of Appeals' decisions subsequent to *Ryan*, with the exception of *Booth*, pose the stevedore's warranty as one of reasonable care and a different panel in the *Booth* case might have decided otherwise. Now, let us turn to the so-called common law warranty of fitness seized upon particularly by *amici curiae* as part of the stevedore's warranty of workmanlike service.

## The Warranty of a Supplier of Chattel

The statement in the *Ryan* decision that a stevedore's obligation to the shipowner is "comparable to a manufacturer's warranty of the soundness of its manufactured product"[7] must be taken in context. This Court was struggling with the *Halcyon*[8] decision which held that there was no contribution among joint tortfeasors. This Court alluded to a manufacturer's warranty to emphasize its analysis of the theory of indemnity as one sounding in contract rather than in tort. We submit that the language is not to be taken literally to impose every warranty of a manufacturer upon a stevedore company whose primary function is the rendering of service to the shipowner and who incidentally brings aboard gear to be used in the furtherance of the performance of that service.

Petitioner's citation to the case of *Kellogg Bridge Co.* v. *Hamilton*, 110 U.S. 108[9] refers to a case in which a manufacturer of an article *sells* it. There is is no dispute that a manufacturer who sells a product impliedly warrants its fitness for the intended purpose. *Uniform Sales Act* § 15(1).

It is obvious that there is no sale of goods by the stevedore. The Court of Appeals in the *Booth* case likens the stevedore to a bailor who supplies equipment.[10] The Court of Appeals for the Ninth Circuit points out

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[7] 350 U.S. at p. 133, 134.
[8] 342 U.S. 282.
[9] Pet. Brief p. 13.
[10] 262 F.2d at p. 314.

that a stevedore is engaged in the performance of a service, not the manufacturing of a product. (R. 53).

With this background in mind, we turn to the law which is concerned with the implied warranty of a non-manufacturer and non-seller. The two types of cases comparable to the fact situation of the stevedore supplier are those of bailment for hire and contract for work, labor, and materials.[11]

**1. Bailments for Hire**

It is rather sadly noted by the commentators that proof of negligence is required in most of the cases which deal with the question of holding a bailor liable for furnishing defective chattel.

> "While most of the cases are *contra*, there are a few bailment-personal injury cases which hold the bailor strictly liable in warranty for furnishing a latently defective chattel." 1 Fromer and Friedman, *Products Liability* § 19.02, p. 501.
>
> "Far more significant, however, is the failure of many courts to follow the analogy of the Uniform Sales Act as respects liability for latent defects. Before its enactment, there was considerable support for the view that a seller did not warrant against latent defects. The Act gave that view its quietus as to sales, but it persists in bailment cases." Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 Col. L. Rev. at p. 657.

The *Booth* opinion disposes of at least two of the leading cases cited by the United States in its brief as standing for the proposition that the warranty is abso-

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[11] Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 Col. L. Rev. 653, 655.

lute.[12] Those cases are *Mowbray* v. *Merryweather* (1895) 2 Q. B. 640 and *Hoisting Engine Sales Company* v. *Hart*, 237 N. Y. 30, 142 N. E. 342. As the *Booth* decision points out, these cases did not decide whether an injury produced by a latent defect would constitute a breach of warranty.

The weight of authority in the bailment field is still in accord with the opinion expressed in *McNeal* v. *Greenberg*, 40 Cal. 2d 740, 255 P.2d 810:

> "A bailor's implied warranty of fitness does not make him an insurer against all of the personal injuries suffered from the defective operation of the bailed chattel. He impliedly warrants only that he has exercised reasonable care to ascertain that the chattel is safe and suitable for the purpose for which it was hired." 255 P.2d at p. 812.

A later California case approving the opinion expressed in the *McNeal* case is *Rohar* v. *Osborne*, 133 Cal. App. 2d 345, 284 P.2d 125, 130.

The case of *Koser* v. *Hornbeck*, 75 Idaho 24, 265 P.2d 988 states the case law applicable to the rental or bailment of a horse.

> "The form of the action is of no real consequence, because the courts all agree that the bailor is not an insurer, and that a mere breach of the implied warranty is not alone sufficient ground for recovery. In addition thereto, the plaintiff must prove that the keeper had some knowledge, or the facts are such as to charge him with knowledge, of the unsuitability of the animal; or negligence in failing to take reasonable precautions to determine its suitability; or in failing to warn the prospective

[12] 262 F.2d at p. 313.

rider of the facts. So whether the action be ex contractu or ex delicto, the required proof is the same." 265 P.2d at p. 991.

Another horse rental case affirming a judgment for the defendant and approving of a test of reasonable care for the bailer is *Dam* v. *Lake Aliso Riding School*, 6 Cal. App. 2d 395, 57 P.2d 1315, 1318. Two cases to the same effect in the non-horse field are *Moore* v. *City of Ardmore*, 188 Okla. 74, 106 P.2d 515, and *Price Boiler and Welding Co.* v. *Gordon*, 138 F. Supp. 43.

In this respect, it would perhaps be helpful to look to the law of the jurisdiction where the contract in this particular case was to be performed, Oregon. The case of *Miller* v. *Hand Ford Sales, Inc.*, 216 Or. 567, 340 P.2d 181 discusses the law of implied warranty as it applies to a bailment for mutual benefit but decides on the facts of the case that there was no bailment for mutual benefit. The court notes that there are several classes of bailment for mutual benefit and one of the classes is where the use of the property is incidental to some business transaction between the parties. 340 P.2d at p. 184. This would seem to fit exactly the relationship between the stevedore and the shipowner. The court states the obligation of such a bailor in the following terms:

> "If the bailment is for the mutual benefit of both the bailor and the bailee, such as a let for hire agreement, then a higher duty arises on the part of the bailor, the general rule being that, while the bailor is not an absolute insurer against injuries from a defective chattel, he is charged with the duty of inspection to determine whether or not the chattel is fit for the purposes intended. Thus, if the defect was discoverable, he became liable for

injuries to the bailee, arising from this unsafe condition, under the theory of an implied warranty of fitness. *Eklof* v. *Waterston*, 132 Or 479, 489, 295 P. 201, 68 ALR 1002; 6 Am. Jur. 309, Bailment § 194." 340 P.2d at p. 184.

**2. Contracts for Work, Labor and Materials**

Another field in which the courts have been reluctant to import an implied warranty of fitness is in the field of contracts which are primarily for service rather than the furnishing of materials.

The leading case is *Perlmutter* v. *Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792. The New York Court of Appeals held in an action for damages founded on an alleged breach of warranty of fitness of blood supplied by a hospital that the transaction was not a sale and, therefore, no warranty was implied. The Court says that the answer turns upon whether the transfusion described in the Complaint constitutes a sale under the sales act; in other words, there a vendor-vendee relationship between defendant and plaintiff. The court says:

> "The essence of the contractual relationship between hospital and patient is readily apparent; the patient bargains for, and the hospital agrees to make available, the human skill and physical material of medical science to the end that the patient's health is restored.
>
> "Such a contract is clearly one for services, and, just as clearly, it is not divisible. * * * It has long been recognized that, where service predominates, and transfer of personal property is but an incidental feature of the transaction, the transaction is not deemed a sale within the Sales Act." 123 N.E.2d at p. 794.

There are a whole series of blood transfusion cases which follow the same reasoning. *Dibble, Admr.* v. *Latter Day Saints Hospital*, 12 Utah 2d 241, 364 P.2d 1085; *Goelz* v. *Wadley Research Institute & Blood Bank* (Texas), 350 S.W.2d 573; *Gile* v. *Kennewick Public Hospital District*, 48 Wn. 2d 774, 296 P.2d 662.

The characterization of the contract as one primarily for services as a basis for denying an implied warranty of fitness has been extended to other cases in the service field. In *Foley Corp.* v. *Dove* (Dist. of Col.), 101 A.2d 841, the owner of a drive-in theater sued a company which constructed walls for the breach of its warranty of workmanlike service when the walls collapsed. The court states at p. 842:

> "Appellant attempts to distinguish the present case from the Poole case by contending that the implied warranty involved here is one arising under the Uniform Sales Act: When the buyer makes known to the seller the purpose for which the goods are required and relies on the seller's judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose. The answer to this contention is simply that construction contracts where the furnishing of materials is only incidental to the work and labor performed, do not come within the purview of the Sales Act."

To the same effect is *Ladd* v. *Reed*, 320 Mich. 167, 30 N.W.2d 822. It is clear that the agreement between petitioner and respondent was primarily one to provide services (Resp. Exh. 21, R. 31-40). The supplying of gear was merely incidental to the performance of the services described in the contract. The facts are farther removed from the sales concept than the facts of the

transactions for the furnishing of blood or construction contracts. Here, there was no permanent supplying of material to the customer where the customer becomes the owner of the blood or the construction. There was no transfer of title. Further, the shipowner would know that the gear being used temporarily aboard its ship was not brand-new and was going to be used on his ship today and on another ship tomorrow. He would also know that the stevedore does not manufacture the rope, nor have anything to do with constructing it. In the case of the blood transfusion or the construction contract, the supplier has actually prepared the material for its customer and the customer should be entitled to a greater reliance on the supplier than the customer of a stevedore who merely brings some equipment to a job. If no warranty of fitness is owed to the blood donee and the building owner, then none is owed to the shipowner.

It is noted that even the commentators whose articles are cited by the United States in its brief, must admit that case law supporting the implication of warranties in the service field is lacking. Mr. Farnsworth notes in connection with contracts in the food service field and referring to matters subsequent to 1936:

> "Three cases have since found an implied warranty without basing it on a finding of sale. They are, however, the exception, and most courts proceed on the assumption that to find a warranty one must first find a sale. For example, in *Temple* v. *Keeler* the New York court termed the serving of food a 'qualified sale', a sale of that which is eaten. Even the Massachusetts court which decided *Friend*

v. *Childs Dining Hall Co.*, has, in later cases, shifted the basis of the warranty to the finding of a sale." 57 Col. L. R. at p. 662.

So, even if the warranty of workmanlike service is to be equated with the warranty of a shorebased service contractor or bailor, the weight of authority still imposes a test of reasonable care. Let us take a look at this question from the public policy or equity standpoint about which petitioner is so concerned and see why the majority of the courts have not done what the commentators desire and why this Court should not do so in this case.

**The Policy Question**

The notion that imposing absolute liability on a supplier is somehow sound as a matter of policy is specious. The three most discussed reasons for doing so in the manufacturer cases are: to facilitate the plaintiff's recovery of compensation; to provide an incentive to the manufacturer to make his product safe; and to spread the risk to those better able to bear it. In his discussion on implied warranties, Dean Prosser takes these arguments to task.[13] In a negligence action against a manufacturer, the plaintiff must prove that his injury was caused by a defect in a product and that the defect existed when the product left the hands of the manufacturer. Strict liability doesn't aid him in this proof. It is true that the plaintiff has to prove negligence and that he seldom has any direct evidence of what went on in

[13] 69 Yale Law Journal, p. 1114.

defendant's plant. He is, however, aided by the *res ipsa loquitur* doctrine or its equivalent which gives him an inference of negligence, and according to Prosser a jury verdict for the plaintiff usually follows. In this particular case the trial judge gave the plaintiff the benefit of an inference of negligence (Find. of Fact [22] R. 26) but found that the respondent had overcome it. This is the apparently rare case where the supplier wins and the petitioner, unable to accept it, demands a change in the law. We have already pointed out that the petitioner here is in a much better position than the usual customer in that he knows where his supplier can be found and can conduct whatever investigation is necessary to prove negligence.

The second ground is to provide incentive to the manufacturer to make a better product. As Prosser points out, it is certainly highly speculative, to say the least, that a manufacturer who is not moved by the prospect of negligence liability, coupled with *res ipsa loquitur*, will be stimulated by an absolute warranty doctrine. Furthermore, the stevedore does not produce the product but merely purchases it and uses it. Certainly, the imposition of such a warranty, as a practical matter, cannot move stevedores to do more than make reasonable inspections of their gear when they have nothing to do with the manufacture of it. It is no answer to say that the stevedore can pass the liability on to the source of the product. This is not practical in the bailor situation such as the stevedore is in. The stevedore will probably have great difficulty in proving that the defect was in existence when he purchased the

product or in identifying the manufacturer because he will have used the gear for some time.

The argument which is entitled to most consideration because it is honest is the risk spreading argument. Manufacturers should absorb the loss because they are better able to pay. Let us look at this argument in the shipowner-stevedore context. In the first place, the longshoreman has long since recovered his damages so that the purpose of such a risk spreading arrangement has been satisfied. Secondly, the shipowner is at least the economic equal of the stevedore and in this case the shipowner probably dwarfs the stevedore so there is no reason to suspect that the stevedore is better able to pay. What really bothers the shipowner is his absolute warranty of seaworthiness. The shipowner says, "if I am stuck, you should be too!" The Court of Appeals puts the matter succinctly in its opinion:

> "The efforts of the shipowner in this case to hold the stevedoring company for action done without fault is an attempt to impose upon the stevedoring company the same degree of liability for unseaworthiness as that which is imposed upon the shipowner. We see no reason in policy or otherwise why the stevedoring company should be liable for unseaworthiness insofar as that doctrine encompasses liability without fault." (R. 51)

The liability of the shipowner for unseaworthiness is based on the policy consideration of assessing the shipowner who is better able to pay than the longshoreman. No such policy consideration exists between the shipowner and the stevedore. This Court has stated that the duties of the shipowner and stevedore to the long-

shoremen are based on different principles than their liability with respect to each other.[14] It is a little late to argue the matter on considerations of fairness and equity. We suppose that it was not fair in the sense of fault that the shipowner was held liable in this case, when it was without fault. Is it then "fair" to pass the liability on to another party who is without fault? We submit that it is not.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed or if not, the matter should be sent back to the Court of Appeals for determination of the effect of the express provision of the contract between petitioner and respondent.

Respectfully submitted,

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[14] *Weyerhaeuser SS Co. v. Nacirema Operating Co.*, 355 U. S. 563, 568.